

BEFORE THE OFFICE OF FAIR HEARINGS
MONTANA DEPARTMENT OF PUBLIC HEALTH AND HUMAN SERVICES

In the Matter of the Fair Hearing of)	Case No. 12-0371
Andrea Orendain, Claimant)	
)	STIPULATION OF
)	FACTS AND EXHIBITS

STATEMENT OF STIPULATED FACTS

Andrea Orendain (the Claimant) and the Department of Public Health and Human Services (the Department) by their undersigned counsel stipulate, for purposes of this fair hearing and any appeals and/or review of the fair hearing decision only, to the facts set forth below. The Claimant and the Department agree that this Statement of Agreed Facts is not an exclusive statement of the facts of this case and does not preclude the Claimant or the Department from offering additional evidence regarding any relevant facts.

(1) Prior to October 1, 2011 Claimant received state-funded developmental disabilities community services consisting of respite services.

(2) On August 29, 2011 the Department's Developmental Disabilities Program (DDP) notified Claimant that her state-funded developmental disabilities services, except case management services, would terminate on September 30, 2011 due to newly adopted eligibility requirements in Rules 37.34.224 and 37.34.225 of the Administrative Rules of Montana.

(3) Helen Orendain, the mother and legal guardian of Claimant, made a timely request for a fair hearing to contest the termination of her developmental disabilities

services by means of a letter dated September 26, 2011 that was received by the Office of Fair Hearings on September 28, 2011.

(4) Claimant continued to receive developmental disabilities respite services after September 30, 2011 because she requested that the services be continued until a decision was rendered in this fair hearing.

(5) The reason for the termination of Claimant's developmental disabilities services was the purported adoption of Rule 37.34.224 of the Administrative Rules of Montana (ARM) pertaining to eligibility for developmental disabilities services. ARM 37.34.224 provides that on July 1, 2011, funding will terminate for all persons 19 years of age or older who were receiving developmental disability community services as of February 28, 2011 and funded by a combination of the state general fund and the federal Title XX Social Services Block Grant. It further provides that individuals may continue to receive developmental disability community services if they apply for and are determined eligible for Medicaid. It also provides that an individual who has applied for and been determined ineligible for Medicaid may in the Department's discretion continue to receive developmental disability community services funded by Title XX Social Services Block Grant funding if such funding is available.

(6) The process by which ARM 37.34.224 was purportedly adopted is as follows:

(A) On February 28, 2011 the Department filed with the Secretary of State a Notice of Public Hearing on Proposed Adoption and Repeal stating that the Department proposed to repeal ARM 37.34.206, 37.34.215, 37.34.216 and 37.34.221 and adopt two new rules pertaining to eligibility for developmental disabilities services. The notice stated that a public hearing would be held on March 30, 2011.

(B) The Notice of Public Hearing on Proposed Adoption and Repeal in regard to

ARM 37.34.206, 37.34.215, 37.34.216 and 37.34.221 and two proposed new rules was published in the Montana Administrative Register on March 3, 2011.

(C) The Department did not publish the Notice of Public Hearing on Proposed Adoption and Repeal in any newspapers or by means of television, radio or other public media. A copy of the Notice of Public Hearing on Proposed Adoption and Repeal was published on the Department's online website prior to March 30, 2011.

(D) On March 10, the Department sent copies of the Notice of Public Hearing on Proposed Adoption and Repeal to the Department's developmental disability program staff and case managers, providers of developmental disabilities services and members of the Department's Family Support Services Advisory Council (FSSAC) and Quality Council Developmental Disability. The Department but did not send copies of the Notice of Public Hearing on Proposed Adoption and Repeal consumers of developmental disabilities services or their legal representatives or families unless their names were on the Disability Services Rules Interested Party List as of that date.

(E) On or before March 6, 2011 the Department mailed copies of the Notice of Public Hearing on Proposed Adoption and Repeal to persons and entities whose names were on the Department's Disability Services Rules Interested Party List as of that date. The DDS Interested Party List contains only the names of persons and entities that have made a request to the Department to be informed of rulemaking proceedings pertaining to developmental disabilities services.

(F) On March 30, 2011 a public hearing was held on the proposed repeal of ARM 37.34.206, 37.34.215, 37.34.216 and 37.34.221 and the proposed adoption of two new rules pertaining to eligibility for developmental disabilities services.

(G) On June 13, 2011 the Department filed with the Secretary of State a Notice of Repeal and Adoption stating that the Department had repealed ARM 37.34.206, 37.34.215, 37.34.216 and 37.34.221 and adopted ARM 37.34.224 and 37.34.225 pertaining to eligibility for developmental disabilities services.

(H) The Notice of Repeal and Adoption was published in the Montana Administrative Register on June 23, 2011.

(7) Neither Andrea Orendain nor her legal guardian was on the Disability Services Rules Interested Party List. Neither Andrea Orendain nor her legal guardian received a copy of the Notice of Public Hearing on Proposed Adoption and Repeal until after the public hearing on the proposed new eligibility rules had been held and after the new eligibility rules had purportedly been adopted.

(8) Neither Andrea Orendain nor her legal guardian was aware of the proposed changes in the rules pertaining to eligibility for developmental disabilities services until after the public hearing had been held and after the new eligibility rules had purportedly been adopted. As a result, neither of them had the opportunity to attend the public hearing or comment on the proposed rules before they purportedly were adopted.

(9) Andrea Orendain applied for Medicaid but was denied on May 4, 2011 on the ground that she had resources in excess of the resource limit for Medicaid eligibility.

STATEMENT OF STIPULATED EXHIBITS

The Claimant and the Department stipulate to the authenticity and admission into evidence of the documents set forth below. The Claimant and the Department agree that this is not intended to be an exclusive list of exhibits in this case and does not preclude the Claimant or the Department from offering additional exhibits into evidence.

Joint Exhibit #1, Notice of Public Hearing on Proposed Adoption and Repeal pertaining to the proposed repeal of ARM 37.34.206, 37.34.215, 37.34.216 and 37.34.221 and the proposed adoption of two new rules pertaining to eligibility for developmental disabilities services, as published in the 2011 Montana Administrative Register (MAR), Issue No. 5 dated March 10, 2011, pages 312-318, MAR Notice No. 37-534.

Joint Exhibit #2, Notice of Repeal and Adoption stating that the Department had repealed ARM 37.34.206, 37.34.215, 37.34.216 and 37.34.221 and adopted ARM 37.34.224 and 37.34.225, as published in the 2011 Montana Administrative Register, Issue No. 12 dated June 23, 2011, pages 1158-1165.

Joint Exhibit #3, Letter dated August 29, 2011 from Jeff Sturm, Director of the Developmental Disabilities Program, to Andrea Orendain notifying her that her state-funded developmental disabilities services, except case management services, would terminate on September 30, 2011.

Joint Exhibit #4, Letter dated September 3, 2011 from Jeff Sturm, Director of the Developmental Disabilities Program, to service recipients, families and other interested parties as well as developmental disabilities staff and providers.

Joint Exhibit #5, Letter dated September 26, 2011 from Helen Orendain to the Department's Office of Fair Hearings requesting a fair hearing in regard to the termination of Claimant's developmental disability services.

Dated this 5th day of March 2012.

MONTANA DEPARTMENT OF PUBLIC
HEALTH AND HUMAN SERVICES

By: Barbara B. Hoffmann
Barbara B. Hoffmann
Attorney for the Department

Andrea Orendain

By: _____
Helen H. Orendain
Legal Guardian and Attorney for the Claimant

**Andrea Orendain
Fair Hearing No. 12-0371
Transcript**

Harlan Rudolf, Hearing Officer (HR): And this is March 6, 2012 and this is Case No. 12-0371 between Andrea Orendain and the Department of Public Health and Human Services. And the first thing on the uh agenda probably is if we can get on the record, Ms. Orendain, that you do not object to uh reporters being here and people.

Andrea Orendain, Claimant (AO): No, no objection.

HR: Okay. With that, we'd normally allow the Department to present first but I think you, you've agreed that we will go out of order on witnesses somewhat for convenience of the witnesses. And so the first thing we'll probably address is opening arguments if either Party wishes to present an opening argument.

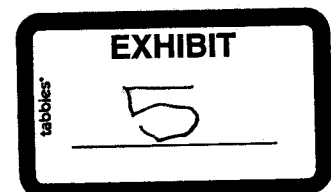
Barbara Hoffmann, Attorney for the Department (BH): Um yes, I would like to present an argument for the Department. Very brief, um just to explain briefly what this case concerns. And this is Barbara Hoffmann. I'm the attorney for the Department and this case concerns the termination of Andrea Orendain's devel, developmental disabilities services as of October 1, 2011. And her services were terminated because of new eligibility requirements for the Developmental Disabilities Programs. Uh and these new requirements were adopted in ARM 37.34.224. And for budgetary reasons ARM 34, 37.34.224 was adopted in June 2011 and it requires that all developmental disabilities clients apply for federally funded Medicaid or Title 20 Block Services Grant Funds to pay for their DD services. And the purpose for this is to shift the funding of the program from state-funded general fund sources to federal funds because uh Medicaid funds are approximately 70% federal funds and Title 20, I believe is 100% federal funds. So um as I stated, the rule required all uh DD clients to apply for Medicaid and Ms. Orendain did apply for Medicaid and her application was denied because she was determined to have excess resources. She had too many assets. Um and she did not apply for Title 20 funding because the Department had already advised clients that if they had been turned down by Medicaid for having excess resources they would not be eligible for Title 20 funding. So there was no reason for her to apply for that funding. So as a result, there is no funding source uh for her services and as of um September 30th her services were terminated. She was sent a notice of the termination at the end of August and uh Ms. Orendain, Helen Orendain, who is her mother and her legal guardian, made a timely request for a Fair Hearing and to contest the termination of services. And I guess I'll let Ms. Orendain um explain what her reasons for disagreement are. The Department's impression is that she's challenging the process by which the new eligibility rules were adopted, but she will explain in detail what her objections are. Would you, well I guess, when would you like her to present her opening argument? I mean it's the beginning of her case so would you like to do it now Helen?

Helen Orendain, Claimant's Representative (HO):

HR: Okay.

?: Don't care, might be good to...

HO: Your Honor, thank you for delaying the hearing. I appreciate that. I'm Helen Orendain, representing my daughter as an advocate, not as an attorney. My daughter is Andrea Orendain who



is challenging the administration rule change 37.34.225 on the grounds it's a violation of due process. Andrea has a benefit, a property interest conferred by DDP for a ten-year period which allows her respite care and enjoy Missoula activities, and that has been terminated. Given the fact that she has this benefit is, I look at it as a property interest which triggers the uh, the State uh, well the Constitution then really triggers uh that because she is uh given uh several rights under the Article 2 of the Constitution, the Declaration of Rights, um of which all persons are born free and have certain unalienable rights. They include acquiring, possessing and protecting her property. So she has a right to protect that property as well as perhaps 35 other individuals who were terminated as well, and they did not receive direct notice of the hearing nor were they allowed to speak or attend the hearing. So that is in violation of those rights.

HO: She also has the right of Section 4, individual dignity, where she discriminated because of her condition. Most of these individuals are retarded and they don't have the uh wherewithal to, to ferret out the information on this uh rather complicated um issue. She also has the right under Section 9 to know. She has the right to examine documents, observe deliberations and be part of the process. She also has the right to be, to participate, which was denied. And she didn't uh, so basically she wasn't heard; she wasn't noticed and she wasn't heard. And it looks like the actual rule changing could be in jeopardy given the fact that so many people um who were the target population were not informed. And the method I'm learning is that um Mr. Sturm used the um, the what is it called, the interested parties list to uh alert the people as to, about the March 30th hearing. Most of those individuals who are the target population don't even know about such a list. And I think that's obviously the, that wasn't directed at the right people. He didn't send messages to the actual people who were um, you know affected by this rule change. And so the people who, as I understand, and Gwen will explain to us, those people are essentially staff people. It's sort of an in house way to alert the um employees of rule changes. But this particular rule change had a different uh distinguishing factor because what it involved was a property interest and these people were being denied the right to um stand up and argue or discuss uh losing a property interest. And you could actually compare that to say um the employees were going to be uh observing or reviewing um retirement uh benefits or something like that. And I'm sure that the State employees would be distressed if they were not given notice of such a hearing, whereas I wonder if, you know, the State felt that they, these people were not important enough or they wanted uh, perhaps they were determined to get this rule passed as quickly as possible, as possible and um so it was done sort of surreptitiously you might say. And this is very troubling, that they would use that avenue um of dissemination of the information.

HO: And I find that very troubling, and therefore I would ask that my daughter not have to pay for any additional services after October 1st and I think that uh actually I would like to see this whole um issue repeated because I don't think it was done fairly. I don't think there was the, the target people were not involved and uh their rights were not protected, observed, and I would really question the authenticity, authenticity of the rule change given the way it was operated. We got no information beyond uh the September uh 2010 letter from Mr. Sturm. There was no communication of coming forward to the parents. I would ask Region V for information and they went to many, many meetings but they didn't seem to have any information. And then I called Mr. Sturm, who always acted like, oh there will be exceptions made, and that was in his letter. Um he mentioned that there would be some um an effort made for those who, who didn't qualify for Medicaid. And that is certainly the case in, for my daughter. And my um, the woman who is the um social worker for my daughter, the reason I applied for the Medicaid for my daughter was she said, you apply, you get denied and then you can compete statewide for Title 20 money. And this was as late as um, let's see, March 28th I spoke to her. And that was two days before the hearing and she never mentioned the hearing. I don't think she knew about the hearing. I just think the communication was so flawed, uh and that information was so inaccurate because given the fact that my daughter is on Medicare, she doesn't qualify for Title 20 money. But I went on thinking well that was true. I was trying to figure out how on earth I

could uh, you know get some services from Title 20, and then learned that she didn't qualify for it anyway. So I think that she shouldn't have to pay for any services after October 1st and I would really like to see this whole rule change repeated and allow these people who were left out, involved. And I would think it would be fairly simple to find out who those people were that have been terminated. And there's maybe as many as 30 people, and I think that's very troubling that um this has occurred. And I guess that's it.

HR: Ms. Hoffmann?

BH: Um I guess I, I just forgot to attend to one business matter. Um Ms. Orendain and I had entered into a stipulation and uh we'd like to offer that into evidence. Have you been given that?

HR: No I haven't.

BH: Oh, okay. Let's see, oh this is the page, sorry. Good thing I have my, my administrative sm, my support staff here to tell me what to do. This is uh the stipulation Helen, and it has uh some stipulated exhibits, uh five I believe.

HR: Okay.

BH: Just sort of established some of the basic facts that we don't disagree about. And then I would like to call as my first witness Gwen Knight.

HR: Okay Ms. Knight, if you would raise your right hand. Do you swear to tell the truth, the whole truth and nothing but the truth?

Gwen Knight, Office Manager, DPHHS Office of Legal Affairs (GK): I do.

HR: Okay, your witness.

BH: Please state your name for the record.

GK: I'm Gwen Knight, K-n-i-g-h-t.

BH: And uh you are employed by the Department's Office of Legal Affairs, is that correct?

GK: I am.

BH: And how long have you worked in the Office of Legal Affairs?

GK: Since 2004.

BH: And uh what is your current job title?

GK: I'm the Office Manager.

BH: And uh as the office manager do you have any duties that are related, excuse me, to the Administrative rule process?

GK: I do. I supervise our Administrative rules specialist and I oversee the entire process.

BH: All right. Um and in the past were you more actively involved in the rule making process than just supervising?

GK: I was. I actually did the rule formatting and submitting to the Secretary of State, things like that.

BH: Okay, thank you. Are you familiar with the Department's Interested Party List for Administrative rules?

GK: I am.

BH: And what is the Interested Party List?

GK: That's a database for people who have notified us that they are interested in rules, rule notices.

BH: Okay, and what information is in the database?

GK: It would be their name, their um, maybe their organization they represent, address, city, state, town.

BH: Okay, thank you. So we would have a mailing address for those people?

GK: We would, we would have on them.

BH: Uh and uh so how does, excuse me, how does a person or an organization's name get put on the Interested Party List?

GK: They would have to let us know or myself or somebody know. They could attend a hearing and let us know that way or they could just simply let us know.

BH: Let us know that they would like to.

GK: That they would like to be on the Interested Party List.

BH: And uh that they would like, okay, thank you. You've, now you've answered that question. Uh and who maintains the Interested Party List?

GK: We, we do.

BH: Um.

GK: OLA.

BH: Office of Legal Affairs?

GK: Um hm.

BH: Okay. Now when a rule notice, either a proposal notice or an adoption notice has been filed with the Secretary of State, is that notice published anywhere?

GK: It is. It's published in the Montana Register um and on our website.

BH: Okay. Um is it published in newspapers or any place like that?

GK: It is not, to my knowledge.

BH: Okay. And are copies of the rule notices mailed to anyone?

GK: They would be mailed to the Interested Party, Party List.

BH: To anybody on the, who is on the Interested Party List?

GK: Correct.

BH: Okay.

GK: Right.

BH: Now this Fair Hearing concerns changes that were to one of the Department's rules, the Developmental Disabilities Services rules in the first six months of 2011. Were you invol, involved at all in that rule making process?

GK: I was. Um I was, we had just hired a new uh rules specialist and I was um supervising and training and very involved in the rule process throughout that time period.

BH: Okay. Um now I'd like to ask you some questions about hearings that are held in connection with administrative rules. The, does the Department conduct public hearings in connection with its rules?

GK: Yes.

BH: And who conducts these hearings?

GK: The reviewing, uh rule reviewer attorney...

BH: Okay.

GK: On our staff would be their conductor of the hearing.

BH: For example, um in a rule concerning Medicaid eligibility that I was reviewing, would I conduct the hearing?

GK: Yes.

BH: Um and um I believe in this case Frank Clinch was the attorney who reviewed uh or who reviewed this, these rules, is that correct?

GK: Yes, I believe so.

BH: Okay. Now I'd like to show you something and um. Helen here is a copy for you. I would like to show you a document that is marked as the Department's, oh here, excuse me Mr. Rudolf, here is the original. Um I'd like to show you this document that's marked as the Department's Exhibit #1. Do you recognize this document?

GK: I do.

BH: Yeah, okay and what is it?

GK: This is the hearings officer pre-hearing statement.

BH: Okay, and what is this used for?

GK: We would um formalize this prior to the hearing so that the attorney would have this script to read from for the rule hearing.

BH: Okay, this, this, this particular document seems to have blanks so what exactly would we do with this document? Fill in the blanks?

GK: Right. We would fill in and make all the necessary changes for this particular rule for the hearing we were about to hold.

BH: Okay.

GK: We'd make all the...

BH: For example, so for the Developmental Disabilities Rule it would indicate the rule numbers?

GK: Correct.

BH: And it would have the name of the presiding officer for the hearing?

GK: Yes.

BH: Um and um so then once it was filled out, what would be done with this document?

GK: This is given to the attorney prior to the hearing and then the attorney reads this entire statement before the hearing proceeds.

BH: At the public hearing?

GK: At the public hearing, yes.

BH: Okay. Um, and um I would, the Department would like to offer Exhibit #1 into evidence at this time.

HO: No objection.

HR: So admitted as Department's Exhibit 1.

BH: Thank you. And then I will show you, Gwen, a document that's marked as the Department's Exhibit #2. Do you recognize that?

GK: I do.

BH: And what is that?

GK: It is the Department's public hearing registration form.

BH: And what is it used for?

GK: These are available at the public hearings for people to pick up and fill out if they intend to make a statement or if they intend to let us know they want to be on the Interested Parties List. This is the information we would have then for them to fill out.

BH: Okay. Would you read the second to the last paragraph on this form?

GK: It says, do you wish to be placed on the Interested Party List for future changes to these rules? And then it has a yes or no.

BH: And uh if somebody completed this at a rule hearing and uh marked yes, what would we do with that information?

GK: We would um, that would come back to our rule person and that would be put on our database.

BH: All right. Um and then in the future, um what would happen if a rule was adopted in the area they were interested in?

GK: They would get the interested party, that would be part of the interested party mailing. They would get the notice.

BH: Okay. So if they had indicated on here that they wanted to be on the Interested Party List, then in the future they would be sent notices about those rules, is that correct?

GK: Correct.

BH: Thank you. Uh the Department would like to offer Exhibit #2 into evidence.

HO: No objection.

HR: So admitted is Department Exhibit 2.

BH: And I have no further questions for this witness.

HR: Your witness.

HO: Okay. Um thank you Gwen. Um it is your responsibility to send out the information, is that correct?

GK: It is.

HO: And you said you mail it, is that right, or email it or both?

GK: We most primarily mail. We have a few people that would prefer an email; then we do it that way.

HO: Um hm. Did Mr. Sturm give you names to include in this mailing?

GK: He did not.

HO: He did not?

GK: Un huh.

HO: Um before it's mailed do you, who looks at the content of the material before it's sent out? In other words the body of it. You said the attorney puts it together. Is there any other level of, of observation on this?

GK: Well it's filed with the Secretary of State.

HO: Filed with the Secretary of State.

GK: That, and it, so we would be sending out the actual official version of what has been filed with the Secretary of State.

HO: And when you read the body of this um, uh information about the hearing it appears as if there are certain issues where individuals will be terminated from services. Does that send a red flag that maybe some other people in addition to your list should be notified?

GK: Not from my perspective, it wouldn't send a flag.

HO: Who would make that decision?

GK: Um probably the division or program level, I don't know. We treat them all the same so...

HO: In other words, it's not your position to, to read the contents. Your position is to get the thing out because it's to expedite the information to the public.

GK: Absolutely.

HO: That's how it works.

GK: Yes, exactly.

HO: Okay. Um and you've already said that, who provides the information. In this case it would be Mr. Sturm would give it to the uh proper authorities and they would, uh the attorney would put it into a certain format. Is that how it's happening?

GK: Yes.

HO: And uh that attorney would be with what office?

GK: The rule reviewer is with our office. They are the person that would be holding the hearing that we just spoke about, and reviewing the rule.

HO: Um hm.

GK: After it's been put together in the format.

HO: Is that the Office of Legal Affairs?

GK: Yes.

HO: That's all I...

GK: Yes.

HO: Okay. Um I was curious about when the vote is taken. They say the, the um, it has been approved but when do you vote? How does that work? In other words, you send out the hearing notice, you have the hearing, and you usually have an opportunity to respond in writing for maybe two weeks later.

GK: Um hm.

HO: When do they determine it's been approved?

GK: The division would take into account all of the comments that they received and they would uh prepare those along with their responses. And then that goes in to the, the notice of adoption. And they have, I think about six months to get that done.

HO: Is that a different committee, the notice of it, what is this?

GK: That's part of the rule process.

HO: Um hm.

GK: First you have your proposed notice and then you take in comments.

HO: Um hm.

GK: And you would do your notice of adoption after that. And then that's...

HO: Okay, so the...

GK: Filed.

HO: The material that we get that shows the comments and the adoption of the comments, do they uh reflect all of the comments or a selective or how does that work?

GK: They should be every single comment that the program received.

HO: But generally, at least when I read the material it didn't appear if they say, Yes I like it or No. I mean it's a, they made comments about perhaps the language or maybe you could make it more brief or blah, blah, you know, so it wasn't like, I'm for it or I'm against it. So how do they make that determination?

GK: Generally those are not the type of comments that are received. It's generally someone saying, your rule is too long or too short, or you know, they're making suggestions.

HO: Um hm.

GK: It wouldn't necessarily be someone's voting for the rule change, to use your term.

HO: Well do they vote?

GK: No, they're, they're just making comments about the rule.

HO: They're just making comments.

GK: Um hm.

HO: So how does one determine whether it's approved, I guess is my question.

GK: Well those comments go to the division or the program that's charged, that's making the rule change and they would write a response and make, respond back to the comment.

HO: Um hm.

GK: And that goes into our final...

HO: And that's incorporated into that last?

GK: Right.

HO: Okay, their response to that.

GK: Right.

HO: Um so you've answered my question on the selective process. You print everything, every comment that's been uh conveyed, is that right?

GK: Absolutely, yes we do.

HO: Um hm.

GK: It goes into the notice.

HO: It looks as if you've answered my questions, Gwen. Thank you.

GK: You're welcome.

BH: I, and I just have one question just to clarify because Ms. Orendain did ask you a question about Jeff Sturm giving you any names. Uh and I think I uh didn't specifically ask you, you said you were involved in this particular rule making process. Were you supervising the mailing of the notices to people on the Interested Party List?

GK: Yes, from...

BH: And in the case of this particular rule?

GK: Yes.

BH: And were copies of the rule notices, the first and the second notice sent to all people who are on the Interested Parties List?

GK: Yes.

BH: Okay, thank you.

GK: Yes.

BH: And I don't have any other questions.

HO: Well I have another question.

GK: Okay.

HO: Would you say that most of the individuals on this list are State employees?

GK: I don't know, I couldn't say that. There is a, they seem to be from various organizations to very few State employees from my recollection.

HO: Um hm. Would you make any generalization as to who they are?

GK: I could not make a generalization to who they are.

HO: Um hm.

GK: Um just trying to do a visual in my head of what the mailing list looks like and...

HO: Um hm, okay.

GK: I, I couldn't come up with a good accurate count.

BH: I do have um one question. Um are there, to your recollection are there any advocacy groups who are on the Interested Party List such as Disability Rights Montana?

GK: There could be.

BH: Okay, thank you.

HR: Thank you, Ms. Knight.

GK: Okay.

BH: May this witness be excused?

HR: Yes, certainly.

BH: Okay.

BH: Thank you very much Gwen.

GK: Thanks.

HR: We'll go off record and then call our next witness here.

BH: Yeah, I guess um.

HR: You bet.

HO: Thank you for your patience.

BH: Are we ready to go back on the record now?

HO: I am.

BH: Would you, uh do you wish to call Mr. Sturm now?

HO: Um hm.

BH: Okay.

HO: Uh yeah.

HR: Any time you need to take a break just let me know.

HO: I'm sorry?

HR: If you ever ne, if you need to take a break at any time let me know.

HO: Oh, thank you.

...inaudible. *Hearing was being recorded at this time and participants thought not.*

BH: Um you know I think it would be easier, well what would be easier for you?

ASSUMING this is Jeff Sturm, DPHHS DD Program Manager (JS): I don't care.

Swearing in and witness identification are not on the record.

BH: Okay, why don't you just sit here, uh sit here next to me and I can take some of your stuff if you...

JS: No. I've got some stuff if I need it here.

HR: Are we ready to go back on record?

BH: I think so, yes.

HR: Yep.

HO: So you have adults and children?

JS: Yes.

HO: Okay, and who is your immediate supervisor?

JS: Bob Runkel.

HO: Do you have a secretary?

JS: Yes.

HO: And she does all your letter writing, is that it?

JS: Some. She does mailings, depends on the letter and circumstances.

HO: Okay. And what do you consider your responsibility toward the developmentally disabled, what beyond these?

JS: I mean, lot of responsibility to certainly monitor the, the programs are managed effectively, to monitor the budget, to make sure our budget's spent best what we can.

HO: Um hm. Do you recall sending a September 2010 letter alerting individuals of the plan to require DD to apply for Medicaid waiver?

JS: Yes.

HO: Okay. And you were the author of that letter?

JS: Yes.

HO: And to whom ^{you} was those sent?

JS: Uh a number of folks it was sent to for the...but it was um sent...

BH: I'm sorry. Which letter are we referring to?

JS: September 10 letter.

BH: Oh, September 10, okay.

JS: This one here was sent to...

BH: Oh, I, yeah, thank you. Okay, so that's the Department's Joint Exhibit 1?

JS: Yes.

HO: Um hm.

JS: For reference the letter...

BH: That came...

JS: This one was sent to, this one right here referencing the September 3, 2010 letter, was sent to service recipients, families in trust, individuals, regional managers, targeted case managers, DD Program staff and providers.

HO: Okay, so in other words you would have a list of names of individuals who were DD that would be required in the past to uh transfer or convert to Medicaid waiver, is that right? In case you wanted to.

JS: That's for the Department.

HO: In case you wanted to get in touch with them again. In other words you would, you'd compile some kind of list of names of these individuals, is that right?

JS: We have numbers of mailing lists that go for different purposes. You know some providers...

HO: So you have it? In other words if you need it you've got it, is that what you're saying?

JS: Yes, different lists.

HO: Okay. How are these letters sent? Certified, registered, just regular mail?

JS: I believe they were sent regular mail. I'd have to talk to our staff about that but I believe they were just sent regular mail.

HO: Okay, in the letter you presented the plan about the conversion to the Medicaid waiver. And what was the purpose of that plan?

JS: To notify folks of the pending change in funding.

HO: And was it also, there was money hoped to save or was that part of it?

JS: At that point in the budget process we were expecting in the Governor's budget to show that we were going to have a reduction in our budget. And because of the way the reduction was happening we needed to let, our goal was to let everybody know so they could make the plans necessary to either continue in services or, worst case to not continue in services. So it was an early alert and remember at this point the Legislature hadn't even convened yet. And all we knew that the Governor's budget was going to have this in there but the Governor's budget wasn't coming out for two months after even the letter went out, so it was an early warning that we expected some changes in our budget that could impact people's lives and we wanted to let folks know.

HO: So would you say the Governor was the instigator of the plan or were you or how did that work?

JS: Well it, it's a long process mainly. We, we start the budgeting process months before the Governor's budget even goes out. And on this one it was particularly related to the 5% reduction plan that we're mandated to do. And so as a result of the 5% re, budget reduction plan a number of things went on that plan. This was one of the items that went on the plan from the DD Program and that was accepted in the Governor's budget and then later verified, or passed by Legislature, as it was a budget cut to us.

HO: Okay, now that information that was coming out about that time was grim, was it not, and proved to be inaccurate as it was...?

JS: Well it was, I don't know if inaccurate. I mean it was, it was certainly grim. Any time we have a budget cut it's grim but it was not inaccurate.

HO: No, I mean the projection for the, budget projections were?

JS: You mean for the State?

HO: Yes.

JS: Yes, oh yes. Yes, yeah.

HO: Uh huh. Okay, and I think at the end of this past year um Montana had a surplus of maybe \$340 million. Does that sound right?

JS: That's what the paper, the same thing I read in the paper you probably do.

HO: And then Public Health and Human Services returned 28 million at the end of this past year. Now given the fact more money is available, that would be from your uh Public Health and Human Services, wouldn't that allow for maybe some um changes, modification where the individuals who were terminated could be reinstated?

JS: No, cause the budgets are designed and each division has a budget. And we have a budget that's appropriated to us to spend for a purpose, for this purpose for DD services.

HO: Um hm.

JS: We spend our budget. We didn't return any money. Our entire budget in fiscal year 11 is, well it's every fiscal year...

HO: I think the bureau as a whole...

JS: The Department, it wasn't our budget nor do we have access to that budget. We, we're responsible for our DD budget...

HO: Oh, I see.

JS: To manage that. And what is...

HO: And you spent it all?

JS: We spent it all. We, we reverted no money from DD services last year.

HO: And there's no way you can borrow from the bureau?

JS: No. No and it's appropriation process, how the Legislature appropriates money is to divisions, not...

HO: I see.

JS: You know, so it wasn't our money.

HO: In your letter you had, in this 2011 letter you said, it's our goal to try to limit hardships to individuals and to try to reserve State general funded services for those who truly cannot convert their services to the Medicaid waivers. What was the purpose of that phrase?

JS: Um, it, um which phrase? Read the words of that phrase to me again. I'm not sure exactly what you're referring to in the letter here. It's our goal in the last sentence here, is that what you're referring to here?

HO: Yes, I think it's the last sentence.

JS: Okay. Let me just read it quickly.

HO: There was in other words a ray of hope to parents reading that, that.

JS: And it, it, you know, we, we did from the beginning try to limit hardships. Uh I think the, the beginning of the letter talks about, we expect hardships. You know, we were expecting these cuts but our goal was from the beginning to limit those hardships or try to preserve services for as many people as we could.

HO: Well, no aside, how many could not truly convert to Medicaid waivers? How did you determine that?

JS: We didn't, from the beginning we didn't know that. We knew we had this list of, of individuals.

HO: Well you knew there was a maybe but what was the final figure?

JS: Well we're not finally done yet. We have some numbers that, that as of, as of right now that I can give you but the conversion process, you know right now of the 375 individuals, if you want, do you want those numbers?

HO: Okay, say I do.

JS: Is that what you're asking for?

HO: Okay, you had 375.

JS: We started with 375 individuals that were receiving general fund services, and that was a reduction of the, the cuts were the reduction of that 375 individuals.

HO: Um hm.

JS: That's what the cost was, that \$2.1 million. Of that individuals, of those 375 right now 266 have been converted to Medicaid; 33 have been moved to Title 20, which is the block grant money we're referring to; 53 were exited from services.

HO: 53?

JS: 53. And 23 we're still waiting right now for because there's different issues with trusts and other things that are still in, in the works.

HO: So these 53 are non-Medicaid, is that right?

JS: Yes.

HO: And they're just out there?

JS: They're, yeah, they're...

HO: They're terminated?

JS: They're out of services. I don't know where they are. They're not in services.

HO: They're terminated.

JS: Yes.

HO: I see, okay. Um I would like to show, Your Honor I'd like to um give this to you. This is premarked Plaintiff's...

JS: Okay.

HO: Exhibit...

JS: Okay, that's the same one I have here so I don't know what you need. I, I've got a copy right here of the same letter so...

HO: Okay.

JS: So I can look at this and you keep that.

HO: I'd like to enter this into evidence then.

HR: ...that one.

BH: No objection to that.

JS: Okay.

HR: So admitted is Claimant's Exhibit 1.

HO: And you recognize the letter?

JS: Yes.

HO: And how do you recognize it?

JS: I have a copy of it.

HO: Okay. Okay, after the September 2010 letter was sent how did you communicate with the recipients?

JS: Um primarily our, our, our usually route of communicating is through our case managers so, so we, we, we communicate a lot with our case managers of making sure this communication went to individuals, to families, got folks down to Medicaid so there was a lot of, a lot of contact, a lot of information that went to case managers regarding this change, potential change at that point.

HO: Well that strikes an interesting point because as late as March 28th uh my daughter's case manager told me that um there would be no services for non-Medicaid individuals after July 1 of that year. However, she could apply for medi, for Medicaid, be denied, and then appeal statewide for Title 20 money.

JS: Um hm.

HO: Is that sound?

JS: She, if she was denied Medicaid the, the Title 20 money was reserved as a hardship for people that weren't able to make Title 20. But as part of that hardship there was a determination of who was eligible for the Title 20 money. So there was a process, yes. If you're denied Medicaid you can apply for Title 20. It wasn't a guarantee; it was if you met the criteria of who was eligible for Title 20.

HO: Well however, in the literature I read the, the uh Medicare individuals, which is what my daughter is.

JS: Um hm.

HO: Could not apply for Title 20 money.

JS: No, we, we, the Title 20 application...

HO: That's even in our new...

JS: Um hm.

BH: I, I think I know what you're talking about. Let me see if I can find that.

JS: Yeah.

BH: Oh, it's on the notice, on the, the comments and responses.

HO: It was on the final and the adoption.

BH: Yeah, and that's one of our exhibits. Let me just find that.

HO: I think it's on page 4.

BH: Okay, yeah. Let's look. Uh so I, this is, Mr. Rudolf this is Joint Exhibit #2, the notice of adoption and repeal. And you say it's on page 4? Okay, let's get to that.

HR: What Exhibit? I, I've never received any exhibits from either Party.

BH: Oh, the Stipulation and the uh...

HR: The Stipulation?

BH: I'm sorry, it...

HR: Oh, that's part...

BH: The Exhibits are attached to the Stipulation. I'm sorry.

HR: Got it.

HO: This is actually...

BH: So it would be at the back of that and I'm sorry. I didn't really make that clear but we were submitting exhibits. That would confused and Helen...

HR: Okay.

BH: Okay, yeah. So um, let's see. Helen is terrific. I think it was on page 4, okay, response.

JS: Let me see what you're looking at.

BH: It's a comment response that talks about who we would give Title 20 funds to and I'm just trying to find the right page.

HO: I thought it was on page 4 but.

BH: Okay. Don't worry, we'll find it. I, I, you referred me to it previously Helen and I...

HO: I know I did and...

BH: It's in here somewhere.

HO: In fact I was...

BH: Here, let me look at your um email. It'll say where it is.

HR: Is it response #5? No.

BH: It's a statement about um not giving Title 20 funds to people who were denied Medicaid because of excess resources. Did you come across that?

HR: Yes.

BH: Did you find that?

JS: I didn't find it but I, I know what you're referring to and...

BH: That's what we're looking for.

HR: Comment #10.

BH: Ah, okay.

JS: Thank you.

BH: Yes. Yes, absolutely right.

JS: Yeah.

BH: L, and Helen that's on page 1164, Comment and Response #10. I think that's what you're referring to.

HO: Okay, here we go. So how do you, okay so it says, persons found ineligible for Medicaid due to excess resources will not be eligible for Title 20 funding.

JS: Yes.

HO: And you're saying that's not right?

JS: Well it's, it's, it's terminology. People applied for, for the Title 20 funding and there, and, and there's a process to go through in the application process where we look at things. And, and one of the questions is there, has a person, you know I don't have it in front of me, but has the person essentially done everything possible to get Medicaid. And if the answer to that is, is yes, they continue on. If the answer is no, they're not gonna be, we're not continuing on. They can fill out the process. We, we, many of those that were denied went through the process and we started, applied, we went through the form, found out they weren't eligible at the end. So there's a, can you apply? Yes. Would you be eligible? No.

HO: Oh, so then you can apply but you're not gonna get it type of thing?

JS: Well.

HO: You...

JS: You're not gonna get it if you, if you have not done everything possible to get Medicaid, which is a resource issue.

HO: So in other words if you didn't spend down to get Medicaid you didn't get it, is that it?

JS: Uh many of the folks, yes.

HO: So the Medicare recipient would not get Title 20? That's accurate but it's...

JS: Well Medicare or Medicaid, I mean I'm just keeping straight here two different services.

HO: I understand that.

JS: So the Medicaid folks that, that made an application and did not, were not successful because usually what the Office of Public Assistance will see you have resource. If you spend it down you

might be eligible, whether it's monthly income or it's a, it's a resource of some other kind. People do spend those down to get eligible. People will put money into trusts. There's different ways that people, and I'm not a Medicaid expert but there's processes that people do to get Medicaid eligible by making spenddowns. And many people on the list chose to make those kind of decisions. If you chose not to make those decisions you would not be eligible.

HO: Okay, thank you.

JS: Okay.

HO: Now in your letter you indicated that those who truly could not convert uh there might be alternatives or in other words you would communicate.

JS: Um hm.

HO: Uh but you're saying you didn't directly communicate with these individuals. You did it through your uh region directors or uh?

JS: Regional offices and case managers were the primary contacts.

HO: That kind of thing, um hm. Um do you recall in my, I talked to you several times over the telephone and I remember you saying that exceptions would be made and that parents shouldn't be penalized for planning for their children. So it was kind of upbeat, kind of happy talk. Um and since DDP did not, DDP did not issue status reports and the local office generally did not have information, I would call you. On March 21st I had a telephone conversation with you. I was seeking information and you replied, those not qualifying for Medicaid would not have benefits beyond July 1, 2011. You said it's a done deal. Do you recall that conversation?

JS: I don't remember exactly that that was our initial planning.

HO: But that's...

JS: From the beginning.

HO: That would have been your thinking at the time, that July 1 was it. Um but July 1 had not been voted on. That was March 28th.

JS: Um hm.

HO: March 30th was the act, actually it was, our conversation was March 21st. Nine days later you would have the vote so that was premature on your thinking, was it not?

JS: The, the, we were...

HO: You said...

JS: Yeah.

HO: You said it's a done deal. Uh July 1 is the cutoff date.

JS: July 1 is when the budget reduction took place.

HO: Yes.

JS: We were preparing prior to that, even during the legislative session, to get ready for the projected budget reduction. By that time we were pretty convinced. Transmittal date had happened, the sub-committee was over. Usually if we're gonna get changes in the budget they happen then. By that time they're usually pretty firm and we start planning ahead for the July 1st date.

HO: By the same token, you didn't bother to tell me that there was a March 30th hearing. In other words this vote hadn't taken place, or in other words the hearing had not taken place. You'd already said it's a done deal so didn't, it appeared to me, it appears to me that that's premature thinking. Um I could have gone to the March 30th hearing had I known about it.

JS: Yeah, I, I don't know what, you know whether we talked about the hearing. I don't remember that conversation but.

HO: Let's talk about this March 30th on the hearing notice.

JS: Um hm.

HO: Um did you send out a hearing notice about the March 30th?

JS: We don't send out the hearing notices.

HO: Who sends them out?

JS: They're sent out through the Office of Legal Affairs. And notices come out as part of the rule hearing, not through the divisions but through an Interested Party List that is addressed by the Department, not by divisions.

HO: And those are, those are sent out by Gwen.

JS: Um hm.

HO: And we heard from Gwen. Um how did you communicate with these individuals who were terminated?

JS: The individuals that were terminated got a letter that said on this date termination. It had the included information about a fair hearing options. Everybody received a letter.

HO: Okay. How did you communicate with these individuals about the March 30th hearing? How did they find out?

JS: Um either they were on the Interested Party List or we made an effort to let our staff know it was going to happen so they could inform folks about the hearing. We had conversations, we had, we had mandatory telephone calls on March 3rd and, 2nd and 3rd or 3rd and 4th, with all case managers to fill them up to speed on the, what's going on, to keep them up so they can communicate. So they go out and, and talk to families or individuals and services about the whole process.

HO: The, the um, the list that you speak of, the Interested Parties List, the individuals have to know it exists. Uh the rancher out in Choteau, who doesn't communicate with Helena, probably doesn't know

about this list. So if you were just depending upon that list, that's a very selective list of individuals who would have some proximity or some close interest with Helena. Um you would, what is interesting is that the individuals that have been terminated have an interest. They had a benefit of some kind.

JS: Um hm.

HO: Differing, in different cas, situations. And under the law you would be required to inform them directly that their particular benefit was in jeopardy. And I don't think you have to go further than the State Constitution to kind of check into that. Um...

BH: Excuse me Helen, is that a question?

HO: Would you agree?

JS: I don't, I don't know. The, the, our, you know that is our response where what the law is you're referring to.

HO: Well let's see, it'd be Article 2 of the Constitution of the State of Montana. And we're talking about a property interest that they have. In other words, let's just say that you had a uh just to get some kind of comparison here, um as a State employee you probably have a retirement plan of some kind.

BH: Um hm.

HO: And if the State decided to make some changes in the rules and it didn't invite you, how would you feel?

JS: I don't know. And that would be, you know I, I don't know. I mean...

HO: You would probably not be comfortable about that, right?

JS: Well.

HO: Okay. This may seem miniscule in comparison but these individuals who have this benefit from the State, be it respite, be it day program, whatever it is, it's pretty huge in their lives and it really determines how their activities are going to flow. If they're not informed that that particular benefit is in jeopardy that is a violation of their rights.

JS: Well I would argue that people informed. We, we made, we made extreme efforts to make sure folks were informed through letters, through their case managers, you know to let people know what was going on.

HO: Well I know I didn't receive any information and the people I spoke with did not receive information. But you, because they are mentally disabled it would appear that even a higher level of care would have to be uh used. Many of these people don't live with their families. They live in group homes. The adult DD is, has a challenging life. Um and I'd just bring your attention to some of these rights that they have. Um inalienable rights of property, um you know, unavailable rights. All persons are born free and have certain inalienable rights. They include acquiring, possessing and protecting this property, so they have a right to know personally. And you say you depend on all these other individuals to, to do that; apparently that did not happen given the fact that the responses in that

adoption, and Gwen said that all of them are recorded, reflected people of more of a sophisticated nature that we're talking about. I would say they were probably staff people or of that nature. They were, you didn't have people, um parents. You didn't have caregivers discussing the possibility that perhaps 25-35, or now I'm hearing there's probably 50 of these people, did not know that their right was in jeopardy.

JS: I'd argue with that. We, we made extreme effort well beyond what we're required to do by notifying case managers or family members. Because of folks with cognitive disabilities we've learned over the years. Sending out letters to people with cognitive disabilities and explain and understand them has not worked. We've done a much better job when our case managers have had the opportunity to sit down and explain what this means, help the person through the process, which happened all across the board. It, I think it's why we're so successful. So many some people got Medicaid is because our staff did a tremendous job of going out there and making the effort and making sure people understood. The numbers I gave you earlier were much less than we had anticipated because of the extreme efforts of our staff to get out to people, explain it to them, help 'em through the process, so I'd argue that. I think we, we took an extreme measure to make sure the people, because we do value services for people. We know how important they are and at the end I can, I can, I can say that the people that needed services are still in services. We did a great job of making sure that nobody was out in the street. So I think our staff did a tremendous job.

HO: Well in our conversation you didn't bother to tell me about the hearing.

JS: And I don't remember.

HO: You have no documentation that you sent out the right letters to those individuals who would be personally left out of a program. Can you, do you have some documentation that you did in fact uh contact them directly? You say all these people did this stuff but is there any documentation?

BH: No. We, we stipulated...

JS: Yeah.

BH: That we did not send copies of the rule notice or letters to clients, that we communicated through case managers.

JS: Um hm.

HR: Okay.

HO: And the notice that was sent out by Gwen, you did not um add names I understand. In other words you let Gwen do all of the sending out the information about the uh the hearing, the March 30th hearing, is that right?

JS: It is the process of the State, is an Interested Party List goes out from the Office of Legal Affairs, not through us. So we are...

HO: But you could add those, could you not?

JS: People, we, we can't add 'em. People need to request, people can request their name to be on there. Who's on the list I don't even know. We don't, we don't monitor the list.

HO: You're familiar with the rule making process, right?

JS: Um hm.

HO: This is something that you've done over the years. Um if you don't inform the adversaries then they don't come, right?

JS: I, we, the rule process is, is a, is a mutual process between us and the Office of Legal Affairs. They have a function; we have a function. Their function is to do the hearings, to do the notices. Our function is to design the rules. So if it, it's a function that we, we initiate the rules, they take it from there, get the notices out, develop the rule, make sure it gets published. It's a, it's a mutual relationship. Our part of the relationship is getting the rules in place, get in and make sure they're right. They take it from that point. They follow their statutes and rules to how rules get applied.

HO: Well this takes on a little different flavor, given the fact that these individuals have um a property right so to speak. A benefit that's in jeopardy.

JS: Um hm.

HO: It would appear, would it not, that it would be important to contact those people in a direct fashion to comply with the regulations uh in our Constitution about the right to participate? I mean this, this takes on a different tone. Uh it isn't a rule changing to change the light bulbs or something. This takes on a very special message and there again, these are people who are, who are not mentally capable of ferreting out that information. It would seem that given your position you've been familiar with the rule making, you've had the position for a number years, that you would be um sensitive to that, don't you think?

JS: I think we're very sensitive to it. I think that's why we do the extreme measures to make sure that this message gets out. We, we, we, but we've learned over the years sending out letters isn't enough. You need to have that person contact and our case managers are. Everybody on this list has a case manager. We, we require our case managers to be part of our calls, understand this so they can go out and communicate this in a more meaningful way than sending out a letter. So we've learned, we, I think we, we, we went beyond what was our requirement to assure that people are informed of this. We treat this seriously you know. People services is what our, what we do for a living.

HO: Well...

JS: That's why it was important to us.

HO: Wouldn't you also agree that the proof would be in the pudding as to who actually participated? And I think if you looked at those adoption of the rules, here we go, and this is Exhibit, premarked Exhibit 3 um which I would like to show to um, let the record reflect, Ms. Hoffmann...

JS: He got his point across and I already have...

BH: Yeah, it's...

HO: And um...

BH: Oh, okay. It's no...

JS: Okay.

HO: I think even the casual observance of that you would see that those are not people, these are not parents and caregivers. So I mean, so much for the...

JS: As far as who's, um I'm not sure.

HO: Are participating. This is from your, Gwen sent the list out?

JS: Right.

HO: And this is the, and she had stated that all the individuals who commented or appeared were recorded. And those are not parents and caregivers. So those individuals who were terminated were not alerted to this and they don't follow the, the regs according to the State Constitution but they have these special rights, declaration of rights. They should be part of the program, part of the, be able to participate, be informed, isn't that correct?

JS: There, there's a process that they're informed through the legal process through this. There's also a process that we do informally because we treat it so important. And I think the proof is in the numbers of people that we are in services are today, you know. And so I think that's the much more important number for us is...

HO: Well...

JS: Who's in, who's continuing in services after this? Our staff did a tremendous job of working hard with individuals off hours and hours at the Office of Public Assistance with folks to have made sure that they kept services. So I think that's the proof.

HO: Well I don't think we're arguing that point.

JS: Okay.

HO: I think what we're looking at are the people who were terminated.

JS: Um hm.

HO: Who didn't have the information, didn't participate. They didn't get a notice and they were not heard. And you're saying there may be 50 of those.

JS: Um hm, yeah as of today when I say the number was.

HO: And that is a significant amount.

JS: 53.

HO: And then you have to look at the rule change and if the people who were not affected, we agreed weren't part of it, then you have to say, well how valid was the rule change?

JS: Is that a question? I'm not sure what the question is.

HO: Well how valid would that be? I mean...

JS: I think we deal with everything within our means and within the law to let people know about changes that are happening. We treat it seriously. Our staff are compassionate people that do not, that number 53 I, I don't want to see 53 people out of service either. But we do what we can do at the best of our ability within our budget to preserve people in services. And I think our staff did an outstanding job and put a lot of extra effort in to make sure those folks are in services. So I think, you know it, it's unfortunate 53. I, I don't disagree with that. I didn't go into this business to not provide services but we have realities within budgets, within rules, with things that are out of our control we can do. But what we try to do is make sure people are informed of those issues, work with them the best we can to maintain services for those folks, and I think that's what we did. And our staff did an outstanding job. I give so much credit to our case managers, our regional staff, to go out there and really work hard with folks to make sure they kept services.

HO: Well I just would have to reiterate that it appears to me that they were not informed. And that appears to me to be significant. And I would have to question the validity of the rule change given that information. But thank you.

JS: Okay.

BH: No further questions?

HO: No further questions.

BH: Um well just uh...

JS: Or you have some, okay.

BH: Yeah, just a few.

JS: Okay.

BH: In regard to um the whole entity of the rule process, does your program and your division rely on the attorneys and other personnel in the Office of Legal Affairs to make sure that we comply with legal requirements?

JS: Absolutely.

BH: And that, that is our job?

JS: It's your job.

BH: Correct, and you rely on us to do it.

JS: Absolutely.

BH: So um, and just, I think you answered this question but just in regard to any surplus, uh did your program have any extra money at the end of the year?

JS: No. No.

BH: Um and your, your program had no surplus?

JS: Right.

BH: And legally do you have any access to other programs' or other divisions' budgets?

JS: No, none at all.

BH: Okay. Um now just in regard to hardship, there was um some of your letters um referred to dealing with people in hardship situations and trying to make sure that they got services. Now did you consider a client who was denied be, for Medicaid because they had excess resources, because they had too many assets, did you consider that to be, did your program consider that to be a hardship situation?

JS: I'm not clear of the question.

BH: Okay.

JS: In...

BH: Well now no, don't answer the question if it wasn't clear.

JS: Okay.

BH: Um in deciding who could have Title 20 funds we, uh we considered hardship. Did we consider it a hardship if a person had too many resources to qualify for Medicaid if they couldn't spend it down?

JS: If they could spend it down they could, it, if they made all efforts within their means to spend it down they could.

BH: Right. But if they had funds that could be spent for them, like a trust fund, to get services we, did we consider that to be a hardship?

JS: No, no.

BH: Okay.

JS: It was, it was, if people had funds available and Medicaid said you have the opportunity to spenddown or sell whatever it may be, they did not consider those folks. We consi, I mean considering is, people made application.

BH: Um hm.

JS: As we went through the process they, at some point we, we, we, we said they were not eligible because they did not make all efforts to spenddown their money.

BH: Right.

JS: So does that make sense? I mean...

BH: Yes, thank you. That, that does answer my question.

JS: Okay.

BH: Um, um I guess with one question about uh your conversation with Ms. Orendain in March, March 21st. So that was before the rule hearing and uh Ms. uh Orendain see, turn, she considers you, I guess I'm trying to say she, her understanding of the conversation was you said this is going to happen uh July 1st. We are going to force everyone to switch to federal funding. Um now at the time you said that what was the situation with the Department's budget and with your program's budget?

JS: Well we were, we were, we were three quarters of the way through the legislative process. It had been in the Governor's budget, had been cleared in the legislative budget out of sub-committee. That's usually our cue that things are gonna fly and so we start preparing at that point. We can't wait til the Legislature's over to prepare budgets so we, we start preparing during the process to understand where that budget would be. At that point it became, it was, it was pretty clear to us this was gonna go, you know. Yeah, it could have changed at the end, I mean we were always ready for that change. At the last minute Governor pulls it out of the budget and the Governor, the Legislature changes their mind. But we start preparing because of the long process, especially the rule process. If we wait until the sessions's over we cannot get things in place by the time that the effective date is.

BH: Right.

JS: And it puts us into another budget dive cause we're, we have less money, we're spending money we don't have. So we try to be, we're always trying to be three or four months ahead on our budget thinking. So, so that's why we're preparing at that point. That's why the rule was going in place before we even had a budget.

BH: Um hm.

JS: Preparing for that budget of July 1.

BH: Okay. So to the extent that you indicated it was a done deal you were saying that the budget was a done deal and that you were making changes to comply with that and you didn't see any way of, out of that, is that correct?

JS: Yes.

BH: Okay. No further questions.

JS: Okay.

BH: Helen?

HO: No other questions.

JS: Is this going to be...

BH: Oh, okay.

JS: I don't know who that is.

BH: Okay, yeah.

HR: Thank you Mr. Sturm.

JS: Okay.

BH: Thank you very much.

HR: Do you need to be dismissed?

BH: Yes.

JS: Okay.

HR: Thank you. We are back on record.

Laurie Duran Lundberg, DD Supervisor (LL): This is Laurie.

HR: Uh Laurie this is Harlan Rudolf with the Office of Fair Hearings.

LL: Hello.

HR: And I believe that Helen Orendain is calling you as a witness.

L: I believe that's correct.

HR: So if I could swear you in. If you would raise your right hand.

LL: Okay.

HR: Do you swear to tell the truth, the whole truth and nothing but the truth?

LL: Yes.

HR: Okay, it's your witness.

HO: Thank you Laurie. Laurie would you state your name for the record?

LL: Laurie Duran Lundberg.

HO: And what is your employment?

LL: I am a Case Manager Supervisor for the Developmental Disabilities Program.

HO: And for how long?

LL: Well I've been a case manager for 24 years and a supervisor for about one year.

HO: And you're my daughter's case manager?

LL: Yes, I was.

HO: You were. Um I'm sure you became aware of the rule change requiring DD to convert, you're familiar with that?

LL: Yes.

HO: And how were you informed?

LL: Um well I guess we've been talking about this for years, probably as far back as ten years or so and, and um we've had some people convert to Medicaid years ago and slowly over the years more people have been um converting. And then I think um this most recent push, as far as I remember started back in September of 2010.

HO: And what has been your role in the process?

LL: Uh as a case manager I'm, I would contact my clients who were not Medicaid eligible and talk to them about ways that they could become Medicaid eligible and then help them with the process.

HO: And how did you explain that they could do that?

LL: Uh well we were um given information that talked about uh Medicaid services, what the services provide, um and about the State's funding, that people who didn't have Medicaid were funded through the general fund and so we explained what that was. And then uh actually I had a case manager review list that I was um given and then I would present it to my clients or their guardians and we went through, oh there were six different um parts to the review list that we had people sign to help them, to explain why they needed to convert to Medicaid.

HO: If a client had some assets what did you suggest?

LL: Um most of the clients that I worked with that had assets um were instructed to put them into Medicaid qualifying trusts.

HO: And that would require spending down?

LL: Well that would require putting um, putting money into a trust and if they had income every month that was higher than the allowable income for Medicaid then they would have to spenddown.

HO: I see. Did you meet with the Helena DDP officials regarding this issue?

LL: Um well I belong to the Case Management Advisory Group and I'm sure that there's always someone from Central Office that comes. And I'm sure we discussed it then. I didn't personally meet with the, with anyone but.

HO: I see. How were you kept abreast of the progress of the Medicaid waiver conversion?

LL: Um through the regional manager and through the regional manager's weekly phone calls and then they um always forward the minutes from those meetings on to us. And also through the Case Management Advisory Group.

HO: Did Mr. Sturm issue memorandums on the issue?

LL: Yes.

HO: On a regular basis? A printed one or?

LL: Um well not on a regular basis but um in September of 2010 we had, um there was a letter that went out to families and to us, to the case managers that talked about the move to get people eligible for Medicaid. So there were things that were put out in writing.

HO: I see. Did Mr. Sturm send you the notice of the March 30th rule change hearing?

LL: Umm I don't recall. I don't, I'm not sure. I'm sure he probably did. We, you know we have notices that come out about hearings so I'm, I'm sure he probably did. I don't have it in front of me and so I'm, I can't say for certain but, but I would assume that yes, it probably, he probably did.

HO: It would seem that that March 30th hearing would be fairly significant so there was nothing major that would bring, bring it to your attention if it were sent or?

LL: Well it probably was. I just, I just don't recall. You know, I don't recall seeing it but I'm sure it probably, there was probably something that was sent out, because we always get notices of the hearings. Usually anyway.

HO: You're on the Interested Party List?

LL: Well I think that the notices probably, I'm not certain but I think the notices go to the, to the workers, to the...

HO: I see. Do you recall you made an appointment to visit our home on March 28, 2011?

LL: Yes.

HO: For my daughter's annual IPV meeting. And you were asked to bring, you asked to bring Janine Sharkey and she came, is that right?

LL: Yes.

HO: Can you relate what you told me when I asked you about the status of the Medicaid waiver?

LL: Um I have some notes that I took at that meeting but I don't recall what I told you about the status. I remember that actually wasn't her annual PFP. It was a special meeting that I set up with you to come to talk about the Medicaid issue. And I brought um a Medicaid application and the forms that we were needing to fill out. But I don't recall what I told you about. I'm sure I explained the process.

HO: Um hm.

LL: That was where I went through the case manager review list for conversion of non-Medicaid services to Medicaid services.

HO: Do you recall that you said July 1st there'd be the termination for the Medicaid, non-Medicaid individuals?

LL: Um I had sent you a letter in October where I said um that although Montana has not completely converted yet, as of July 1st there will be no new services provided to anyone who is not Medicaid

eligible. And that was what we were told. And that was from um, that came out, I sent you the letter about it oh three weeks or so after Jeff Sturm had sent out a letter about conversion.

HO: Do you recall that you said that I should have Buffy, that's her nickname, uh apply for Medicaid, be rejected and apply for Title 20 money? Do you remember that?

LL: Uh huh. That was what, what I told you was if you had applied for Medicaid and she was not eligible then you could apply for the Title 20 funding.

HO: But now we know that Title 20 isn't available for Medicare recipients, right?

LL: Uh I'm not sure exactly. You mean Medicaid recipients?

HO: Medicare.

LL: Uh I don't, I'm not sure.

HO: Okay, and at that meeting you didn't mention the March 30th hearing. Were you not aware of it then or?

LL: I don't know. I, I don't...

HO: Well I'm kind of getting from your comments that the March 30th hearing wasn't a biggie, that perhaps the DDP office publicized. Am I wrong on that?

LL: Well I...

HO: The March 30th hearing they would have considered whether the rule change would go forward.

LL: Um hm.

HO: So that would be significant.

LL: Yes.

HO: Um you don't happen to recall much push for that or?

LL: Well I, I don't know. I don't, well we, we get notice of it I guess. Rule changes come out a lot I guess...

HO: I know but...

LL: And I...

HO: In other words that was just one run of the mill and there was nothing um special?

LL: Well it was special because it was the rule change for, for you know that was going to affect my clients. Um I'm not sure that I was, I don't know if I remember telling you about the rule change or not. I don't, I don't have that in my notes so I don't know.

HO: But you don't recall telling the other clients about the March 30th hearing either?

LL: I don't have a habit of telling people about rule changes because usually...

HO: About hearings where they could participate?

LL: No I, I don't, I don't generally tell my clients about hearings or rule changes.

HO: Okay, well I guess that pretty well does it and thank you so much Laurie. I um, Ms. Hoffmann has questions for you. Thank you.

LL: Okay.

BH: Well not too many Laurie.

LL: No problem.

BH: I um, I know that you are a supervisor but what is your training? What is your background?

LL: I have a degree in Social Work from the University of Montana.

BH: Okay.

LL: I'm in a couple of quarters of um study toward the Master's Degree.

BH: Um so, so you're a social worker.

LL: Yes.

BH: By background. So your, your tendency would be to be concerned with, your, having the perspective of a social worker you might not be so attuned to legal um legal processes such as rule hearings, is that correct?

LL: That's correct.

BH: Okay, that's the only question I have.

LL: Okay.

HO: No more questions Laurie.

LL: Okay.

HR: Thank you Laurie.

LL: You're welcome.

HR: Bye.

LL: Bye.

HR: Is there any additional witness from either Party?

HO: Well Mike do you want to step up to the plate?

BH: Well the Department doesn't have any more witnesses.

HR: Okay, do we wish to have uh closing arguments from?

HO: Well yes. I mean, yes this paper is...

HR: We can go off record for a while if you want to get yourself organized on what you want to present.

HO: All right, let's go off record.

HR: All right, we're off record.

HR: Okay, we're back on record.

HO: This is Helen Orendain in closing. And I would like to just reiterate that I feel that uh those individuals who were terminated really did not get a fair shake. They did have a property interest and it was virtually ignored. They weren't part of the process. They weren't informed about the hearing individually, which I would think would be required. They were not ac, they were not heard so they didn't get the notice and they were not heard. And I feel that that invalidates the rule change because the critical Parties were not participants. I'm requesting in relief the order be signed that um Andrea Orendain's respite service be reinstated; that she not be required to pay Montana State Developmental Disabilities Program for services after October 1, 2011, and recommend, and I don't know how far the ex, your jurisdiction is in terms of I realize you don't make law but you can uh enforce it. I don't think that um the procedure was proper. I would recommend that you state, that the Montana State Developmental Disabilities Program repeat the rule change, informing the affected developmentally disable and allow them an opportunity to be informed and an opportunity to participate. Thank you.

HR: Okay. Ms. Hoffmann?

BH: Um well the Department uh believes that we have shown that uh the Department complied with all the requirements of the Administrative Procedure Act for adopting a rule. The Administrative Procedure Act does not require State Agencies, it does require State Agencies to keep Interested Party Lists of people who have requested to be informed of the administrative rule making process. And although it, it could be argued that it's desirable to go beyond that, that is what the law required and the Department um has complied with that. Um and I think Mr. Sturm's testimony showed that um, that their emphasis was on letting people know what was going on but not necessarily, well I, I will stop my remarks there. Um the Department would like to submit a brief. Um Ms. Orendain has submitted a brief and uh I can see that it is a very uh, uh document that raises some good arguments about uh constitutional issues so the Department would like uh 30 days to reply. I hate to drag it out Helen, but I have some time off scheduled later this month and do you object to my having 30 days?

HO: I'm sorry.

BH: Do you object to my having 30 days?

HO: No.

BH: Okay, I appreciate that. Thank you, that's very kind of you.

HR: Okay, we will grant that 30-day extension.

BH: And then of course.

HR: And then of course Ms. Orendain will have an opportunity of, of responding to your brief so how much time would you need?

HO: 30 days.

BH: Yeah, that seems to be reasonable.

HR: Okay.

BH: If I'm having 30 days, yeah.

HR: All right.

BH: So 30 days from today I guess. Let's see.

HR: That would be April uh 5th.

BH: Okay.

HR: I believe.

HO: And this you didn't accept, right?

HR: Pardon me?

BH: You did not accept that into evidence.

HR: Right, I didn't, yeah.

HO: You did not.

HR: Yeah, it was basically hearsay so.

BH: Right.

HR: And we did get testimony so.

BH: Right.

HR: So.

BH: She did acknowledge that she had that conversation with you on the 28th so I think you proved that.

HR: So for 30 days would be April 5th.

BH: Okay.

HR: And then 30 days from that would be May 5th so.

BH: Um hm.

HR: Actually May 7th because the 5th comes on a Saturday.

HO: Okay.

HR: And I don't expect anybody will be submitting anything on a Saturday so.

BH: I hope not.

HR: Okay. And I will wait for those and try to get a Decision out as soon as I can and I, I believe uh rules require that I have to have that Decision out within 90 days of completion...

HO: Oh, is that right?

HR: Of the, of the file brief.

HO: Um hm.

HR: So, so I would have 90 days from probably the 7th of May.

HO: Um hm.

HR: Hopefully I can get it done sooner.

BH: Usually he's, he's very timely.

HO: Well that's good to know.

BH: On the other hand your constitutional issue isn't so.

HO: Okay, well thank you very much.

Transcript prepared by Carol Ann Augustine 5/21/12